UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	PROMESA Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
as representative of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO et al.,	(Jointly Administered)
Debtors.[1]	
In re:	PROMESA Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
as representative of	No. 17 BK 4780-LTS
PUERTO RICO ELECTRIC POWER AUTHORITY,	
Debtor.	
AUTORIDAD DE ENERGÍA ELÉCTRICA DE PUERTO RICO,	

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

Plaintiff,

Adv. Proc. No. 19-453-LTS

-v-

VITOL S.A. and VITOL INC.,

Defendants.

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OPINION AND ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT BY VITOL INC., VITOL S.A., AND THE PUERTO RICO ELECTRIC POWER AUTHORITY

LAURA TAYLOR SWAIN, United States District Judge

Vitol Inc. ("VIC") and Vitol S.A. ("VSA" and, together with VIC, "Vitol") are named as defendants in two civil actions brought by the Puerto Rico Electric Power Authority ("PREPA") (Docket Entry No. 1-10 in Adv. Proc. No. 19-453, the "2009 Complaint;" Docket Entry No. 1-56 in Adv. Proc. No. 19-453, the "2012 Complaint"),[2] that were originally filed in and later consolidated by the Commonwealth of Puerto Rico Court of First Instance, San Juan Part (the "Commonwealth Court;" see Docket Entry No. 3-12 at 5). PREPA challenges the validity of six fuel supply contracts (the "Contracts") between Vitol and PREPA concerning the purchase and sale of, in the aggregate, over $3.89 billion in fuel oil and seeks, inter alia, rescission of the Contracts and recovery of the full value or gross profits thereof under Act No. 458 of December 29, 2000. 3 L.P.R.A. § 928 et seq. ("Law 458"). On September 16, 2019, Vitol filed a single pleading containing its consolidated answers and counterclaim to the 2009 Complaint and the 2012 Complaint claiming, inter alia, that all six Contracts are valid and that PREPA still owes VIC $28,489,560.16 plus interest for fuel contractually delivered and received. (Docket Entry No. 3-11, the "Vitol Answers and Counterclaim.")

Before the Court are *Vitol Inc. & Vitol S.A.'s Motion for Summary Judgment* (Docket Entry No. 37, the "Vitol Motion"), and the *Puerto Rico Electric Power Authority's Notice of Cross-Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment on Claims and Counterclaims* (Docket Entry No. 48), and accompanying *Memorandum of Points and*

[2] Unless otherwise specified, all docket entry references in the remainder of this Opinion and Order are to entries in Adv. Proc. No. 19-453.

Authorities in Support of Puerto Rico Electric Power Authority's Cross-Motion for Summary Judgment and Opposition to Vitol's Motion for Summary Judgment (Docket Entry No. 53, the "PREPA Motion" and, together with the Vitol Motion, the "Cross-Motions"), filed by the Financial Oversight and Management Board of Puerto Rico (the "Oversight Board") on behalf of PREPA. Through the Vitol Motion, VIC and VSA seek summary judgment in their favor with respect to all Causes of Action asserted in the 2009 Complaint and the 2012 Complaint, and VIC seeks summary judgment on its counterclaim against PREPA for breach of contract, demanding the recovery of $28,489,560.16, plus interest, for delivered fuel for which PREPA has declined to pay. Through the PREPA Motion, the Oversight Board seeks summary judgment in its favor on Causes of Action 1 and 2 of its 2009 Complaint, on Causes of Action 1, 2, 3, 4, 5, 6 and 8 of its 2012 Complaint, and on Counterclaims 1, 2, 3, 6, and 7 of Vitol's Answers and Counterclaim. The Oversight Board also opposes the Vitol Motion, including VIC's Counterclaim seeking payment of the outstanding $28,489,560.16 and any Counterclaims seeking declaratory relief concerning the six Contracts.

The Court heard oral argument on the Cross-Motions on April 29, 2021, and has considered carefully all of the arguments and submissions made in connection with the Cross-Motions.[3] The Court has subject matter jurisdiction of this Adversary Proceeding under both 28

[3] In addition to the Cross-Motions, the 2009 Complaint, the 2012 Complaint, and the Vitol Answers and Counterclaim, the Court has reviewed the following pleadings carefully: *Defendants' Statement of Material Facts* (Docket Entry No. 38); the *Statement of Undisputed Material Facts in Support of Puerto Rico Electric Power Authority's Cross-Motion Pursuant to Bankruptcy Rule 7056 for Summary Judgment* (Docket Entry No. 49); the *Declaration of Chantel L. Febus in Respect of Puerto Rico Electric Power Authority's Cross-Motion for Summary Judgment Pursuant to Bankruptcy Rule 7056 and Opposition to Vitol's Motion for Summary Judgment* (Docket Entry No. 50); the *Plaintiff's Response to Defendants' Statement of Undisputed Material Facts* (Docket Entry No. 51); the *Vitol Inc. & Vitol S.A.'s Consolidated Reply in Support of Their Motion for Summary Judgment & Opposition to PREPA's Cross-Motion for Summary*

U.S.C. § 1332 and 48 U.S.C. § 2166(a). The Cross-Motions are each granted in part and denied in part, as follows.

I.

BACKGROUND

The following facts are undisputed, unless otherwise indicated.[4]

A. Law 458

In December 2000, the Commonwealth Legislature enacted Law 458 as part of its anti-corruption code, aimed at prohibiting the granting of bids or contracts to persons convicted of certain crimes.[5] Section 928 of the legislation provides in pertinent part as follows:

> [N]o head of a government agency or instrumentality, [or] public corporation . . . shall award any bid or contract for services, or the sale or delivery of goods to a natural or juridical person who has been convicted of, or has pled guilty to, committing a crime involving fraud, embezzlement, or misappropriation of public funds listed in § 928b of this title, at the federal or state level, any other jurisdiction of the United States, or any other country.

Judgment (Docket Entry No. 54, the "Vitol Opposition and Reply"); the *Defendants' Opposition Statement of Material Facts* (Docket Entry No. 55); the *Defendants' Reply to PREPA's Response to Defendants' Statement of Undisputed Material Facts* (Docket Entry No. 56, the "Vitol SUF Reply"); the *Puerto Rico Electric Power Authority's Reply in Support of Its Cross-Motion for Summary Judgment* (Docket Entry No. 61, the "PREPA Reply"); the *Puerto Rico Electric Power Authority's Reply Statement of Material Facts in Support of PREPA's Cross-Motion for Summary Judgment* (Docket Entry No. 62, the "PREPA SUF Reply"); *Vitol Inc. & Vitol S.A.'s Supplemental Submission in Support of Their Motion for Summary Judgment & Opposition to PREPA's Cross-Motion for Summary Judgment* (Docket Entry No. 68); and the *Joint Informative Motion of the Puerto Rico Electric Power Authority, Vitol S.A., and Vitol Inc. in Compliance with the Court's May 10, 2021 Order [ECF No. 73]* (Docket Entry No. 74).

[4] Facts characterized as undisputed are identified as such in the parties' statements pursuant to D.P.R. Civ. R. 56 or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the Vitol SUF Reply, and PREPA SUF Reply, incorporate by reference citations to underlying evidentiary submissions.

[5] Law 458 has since been repealed. See Anticorruption Code for the New Puerto Rico, 2018 P.R. Laws Act 2 (H.B. 1350) (Jan. 4, 2018).

3 L.P.R.A. § 928 (emphasis added). Significantly, the statute defines "juridical person" to include "corporations . . . that constitute, for these purposes, the alter ego of the juridical person or subsidiaries thereof." 3 L.P.R.A. § 928a. The crimes listed in section 928b include, in relevant part, "[a]ggravated misappropriation, in all its modalities," and the section further provides that, "[f]or the purposes of the federal jurisdiction, that of states and territories of the United States, or of any other country, the prohibition set forth in this chapter shall apply in cases of convictions for crimes whose constitutive elements are equivalent to those of the above stated crimes." 3 L.P.R.A. § 928b.

In addition to the prohibition imposed by section 928, section 928c establishes penalties:

> The conviction or guilt for any of the crimes listed in § 928b of this title shall entail, in addition to any other penalty, the automatic rescission of all contracts in effect on said date between the person convicted or found guilty and any agency or instrumentality of the Commonwealth government, public corporation, municipality, the Legislative Branch or the Judicial Branch of Puerto Rico. In addition to the rescission of the contract, the Government shall have the right to demand the reimbursement of payments made with regard to the contract or contracts directly affected by the commission of the crime.

3 L.P.R.A. § 928c. Section 928e requires the inclusion of a penal clause in such contracts that "expressly set[s] forth the provisions contained [in] § 928c of this title," to be incorporated by reference wherever it is omitted. 3 L.P.R.A. § 928e. Section 928g provides that "[t]he remedies granted to the Commonwealth of Puerto Rico in this chapter are in addition to those established in the Civil Code of Puerto Rico, specifically to causes of action for general fraud, fraud in the negotiation of a contract, . . . false or unlawful purpose, turpis causa, fault or negligence. All actions contemplated in the code of laws in effect and those added by this chapter shall be deemed to be cumulative, and may be alleged in the alternative." 3 L.P.R.A. § 928g.

Contractors (including juridical persons) seeking to enter into covered contracts are also required to "submit a sworn statement before a notary public stating if the natural or juridical person . . . has been convicted of, or has plead[ed] guilty to, any of the crimes listed in § 928b of this title, or if he is under investigation in any legislative, judicial, or administrative procedure, whether in Puerto Rico, the United States, or any other country," to participate in such contracts, and "[i]f the information is in the affirmative, said person [must] specify the crimes for which he was found guilty or if he entered a plea of guilty." 3 L.P.R.A. § 928f.

B. Vitol's Corporate Structure

VSA is a subsidiary of Vitol Holding Sàrl and it was incorporated on March 2, 1972. (PREPA SUF Reply ¶¶ 7-8.) On June 5, 1990, VSA's board of directors authorized VSA to use the name Vitol S.A., Inc. (or "VIN") to refer to its branch office in the United States and any other jurisdiction where VSA was required to add to its name the word "incorporated." (Id. ¶ 9.) On August 5, 2005, Vitol officers expressed concerns about whether the Vitol group should be reorganized, citing "all our recent problems (congo /irs etc)" as reasons they might "reconsider whether we should continue with a branch office in the us as opposed to a separate company." (Id. ¶ 15.)

On October 16, 2006, VIC was incorporated under Delaware law, and, on October 25, 2006, VIC's board of directors voted to sell all 1,000 of its shares to VSA for $1,000, to make VIC a subsidiary of VSA. (Id. ¶¶ 16-17, 23-25.) Also, on October 25, 2006, VIC's board of directors elected its officers, some of whom had held similar positions at VIN. (Id. ¶¶ 18, 29-30.) The Puerto Rico Secretary of State authorized VIC to do business in Puerto Rico on November 16, 2006. (Id. ¶ 19.)

On December 20, 2006, VIN and VIC sent a joint letter notifying PREPA that, effective January 1, 2007, the "business activities currently conducted by [VIN] will be transferred to [VIC], a Delaware corporation, under a plan of transfer authorized by the Internal Revenue Code . . . whereby the assets and liabilities of [VIN] will be transferred to [VIC] in exchange for the stock of [VIC]. [VIC] will carry on these business affairs in the same manner as currently conducted by [VIN]." (Id. ¶ 20.) On January 1, 2007, VSA assigned the assets and liabilities of VIN to VIC, including the first three of the fuel supply Contracts with PREPA, and VSA informed the Internal Revenue Service that it would cease conducting new business in the United States effective immediately. (Id. ¶¶ 25, 41, 43, 46-47.) VIC inherited VIN's former "staff, contact information, authorized traders, management team, street address, e-mail addresses and telephone numbers." (Id. ¶ 28.) VIC remained a subsidiary of VSA until December 28, 2007, when VSA sold its VIC shares to Vitol Holding Sàrl, the member of the Vitol group that owns VSA, with IRS approval. (Id. ¶¶ 7, 96; Vitol SUF Reply ¶ 21.)

C. The Fuel Supply Contracts

At issue in this case are six fuel supply Contracts between VIC and PREPA, which were in effect between 2005 and 2009, and under which PREPA accepted over $3.89 billion in fuel oil. (Vitol Mot. at 1, 5-6.) The parties do not dispute that VIC performed its obligations under all six Contracts, five of which expired on their own terms before PREPA filed this lawsuit, and that VIC's net profit margin on the Contracts was less than 1%. (Id. at 1, 6.)

On August 2, 2005, PREPA awarded Contract No. 902-01-05 (the "First Contract") to VIN, which was executed on August 22, 2005. (PREPA SUF Reply ¶ 37.) In each of the six Contracts, there is a "Contingent Fees" clause that states, "[t]he Seller represents and warrants that it is authorized to enter into, and to perform its obligations under this Contract and

that it is not prohibited from doing business in Puerto Rico or barred from contracting with agencies or instrumentalities of the Commonwealth of Puerto Rico." (Id. ¶ 59.)

On February 28, 2006, December 28, 2006, and on another unspecified date, VIN submitted a sworn statement to PREPA (the "Investigation Sworn Statement") that includes substantially the same language as the following, without identifying any particular contracts:

> 4. That Vitol has not been convicted, nor has it pleaded guilty of any felony or misdemeanor involving fraud, misuse or illegal appropriation of public funds as enumerated in Article 3 of Act of September 22, 2004, Act 428, as amended.
>
> 5. That Vitol has not been convicted, nor has it pleaded guilty of any felony or misdemeanor, including the aforementioned above, in federal or state courts of any U.S. jurisdiction or any other country.
>
> 6. That Vitol has no knowledge of being under judicial, legislative or administrative investigation in Puerto Rico, the United States of America or in any other country.

(Docket Entry No. 50-10 ¶¶ 4-6 (emphasis added). See also Docket Entry No. 43-16 at 8-9, 12).

On November 1, 2006, VIN submitted another sworn statement to PREPA (the "Conviction Sworn Statement") with the following language, again without identifying any particular contract:

> 2. That neither the signer, nor the corporation, nor any special society that I may represent, nor any of its corporate officers has been convicted, nor has pleaded guilty at a state or federal bar, in any jurisdiction of the United States of America, of crimes consisting of fraud, embezzlement or misappropriation of public funds, as stated in Article 3 of Act 458 of December 29, 2000, as amended, which prohibits the adjudgment of auctions of government contracts to those convicted of fraud; misapplication or misappropriation of public funds.
>
> 3. That I understand and accept that any guilty plea or conviction for any of the crimes specified in Article 3 of said Act, will also result in the immediate cancellation of any contracts in force at the time of

> conviction, between the undersigned and whichever Government Agencies, Instrumentalities, Public Corporations, Municipalities and the Legislative or Judicial Branches.

(Docket Entry No. 43-16 at 11).

On November 22, 2006, PREPA awarded Contract No. 902-08-06 (the "Second Contract") to VSA doing business as (or "dba") VIN, and on December 1, 2006, PREPA awarded Contract No. 902-07-06 (the "Third Contract") to VSA dba VIN, but neither Contract was executed until after they both were transferred to VIC, which executed those Contracts on January 23, 2007. (PREPA SUF Reply ¶¶ 27, 37, 42-44, 46-48.)

Between December 20 and 21, 2006, VIC submitted sworn statements with substantially the same content as those set forth in the Investigation Sworn Statement, but without referring to any particular contract. (Docket Entry No. 43-16 at 7, 10.) All of the Contracts other than the First Contract included a "Sworn Statement" clause providing, in relevant part, that "[p]revious to the signing of this Contract, the Seller will have to submit a sworn statement that neither Seller nor any of its partners have been convicted, nor have they pled guilty of any felony or misdemeanor involving fraud, misuse or illegal appropriation of public funds as enumerated in Article 3 of Public Law number 428 of September 22, 2004, as amended." (PREPA SUF Reply ¶ 60 (emphasis added).)

Having received the assets and liabilities of VIN on January 1, 2007, VIC executed the Second and Third Contracts on January 23, 2007. (Id. ¶¶ 37, 44, 48.) On June 5, 2007, PREPA awarded Contract No. 902-01-07 (the "Fourth Contract") to VIC, which executed it on July 3, 2007. (Id. ¶¶ 37, 51.) As previously indicated, VIC remained a subsidiary of VSA while the first four Contracts were pending, but VSA sold all of its VIC shares to Vitol Holding Sàrl before the last two were executed. (Id. ¶¶ 37, 96.)

On January 29, 2008, and on December 31, 2008, respectively, VIC and PREPA executed two more contracts, Contract No. 902-14-07 (the "Fifth Contract") and Contract No. 902-03-08 (the "Sixth Contract"). (Id. ¶¶ 37, 53-54, 56-57.) On January 18 and 25, 2008, and on December 18, 2008, VIC submitted sworn statements containing provisions substantially similar to those set forth in the Investigation Sworn Statement and/or Conviction Sworn Statement, with the first and last of these three additional sworn statements specifically identifying the Fifth and Sixth Contracts (respectively), certifying that VIC had not been convicted of the specific offenses listed in Law 458, and agreeing that "this prohibition will be applied in cases of convictions for offenses whose constituent elements are the aforementioned or their equivalent." (Docket Entry No. 43-16 at 2-6; Docket Entry No. 50-11.)

By July 31, 2009, all Contracts except the Sixth Contract had been fully performed and had expired on their own terms. (Id. ¶¶ 37, 110; Vitol SUF Reply ¶¶ 47-48, 118.) On September 4, 2009, PREPA sent VIC a letter confirming that the Sixth Contract would "remain in effect until January 31, 2010," and ordered more fuel oil from VIC under the Sixth Contract, which VIC delivered on October 3, 2009. (PREPA SUF Reply ¶ 110; Vitol SUF Reply ¶¶ 81, 118.)

D. VSA's Misconduct

On or about April 21, 2004, the Independent Inquiry Committee of the United Nations began investigating VSA for paying roughly $13 million in illegal kickbacks to Iraqi officials, from about June 2000 through December 2002, to receive contracts under the UN Oil-for-Food Programme in Iraq (the "OFF Program"). (PREPA SUF Reply ¶¶ 64, 67, 76, 80.) On October 27, 2005, the UN issued a report (the "UN Report") finding that VSA had paid illegal

surcharges to Iraqi officials in exchange for the awarding of oil purchase contracts to VSA. (Id. ¶ 71.)

In November 2005, VSA learned that it was the subject of an investigation by the New York County District Attorney (the "NYDA") stemming from its participation in the OFF Program, and grand jury subpoenas were issued to VSA between November 22, 2005, and July 21, 2006, resulting in a response period extending into September 2006. (Id. ¶¶ 76-79.)

On November 20, 2007, VSA entered into a plea agreement and both VSA and the NYDA issued press releases addressing the guilty plea, upon which leading newspapers also reported. (Id. ¶¶ 80, 82-84.) On December 10, 2007, VSA was convicted of grand larceny in the first degree under New York Penal Law § 155.42 and ordered to pay an agreed restitution amount of $13,000,000 and a $4,500,000 fine. (Id. ¶ 81.) At the very latest, PREPA learned of the VSA investigation and conviction in May 2009, although it is possible that PREPA's Manager of the Fuels Office learned of it as early as November 21, 2007. (Id. ¶¶ 90-91.)

On June 2, 2009, PREPA received a legal opinion from outside counsel advising PREPA that it could terminate its remaining three contracts with VIC under Law 458 based on VSA's conviction. (Vitol SUF Reply ¶ 70; Docket Entry No. 42-8 at 39.) On June 4, 2009, PREPA temporarily suspended VIC from its Registry of Bidders pending its investigation, which suspension VIC contested in a letter dated June 17, 2009; after VIC filed a complaint, Administrative Judge Jaime Ortíz Rodríguez held on October 13, 2009, that VIC should be reinstated during the investigation, since doing so "would not cause any undue prejudice to [PREPA] since if at the end of its investigation it is confirmed that [VIC] should have informed the conviction of [VSA] in the sworn statement, Law 458 itself provides that any contract in effect and obtained in violation of said Law can be canceled and obviously the permanent

suspension from the Registry of Bidders." (PREPA SUF Reply ¶¶ 100-102, 104-105. See also Vitol SUF Reply ¶ 86.)

E. Procedural History

On November 4, 2009, PREPA sued VIC and VSA in the Puerto Rico Commonwealth Court to nullify its final two contracts and to recover all payments made to Vitol under those contracts, while refusing to pay for VIC's final deliveries.[6] (Complaint, P.R. Elec. Power Auth. v. Vitol, Inc., et al., Civil No. KAC 2009-1376 (Nov. 4, 2009); Docket Entry No. 1-10.) On November 28, 2012, PREPA filed a second action seeking to retroactively nullify its first four contracts.[7] (Complaint, P.R. Elec. Power Auth. v. Vitol, Inc., et al., Civil No. KAC

[6] The 2009 Complaint (which concerns the last two contracts) contains the following Causes of Action: (1) a "Declaratory judgment regarding nullification of governmental contracts and the prohibition to contract with public entities" (2009 Compl. ¶¶ 32-49); (2) "Declaratory judgment regarding the nullification of contracts *turpis causa* and/or illegal cause and action to obtain title under Arts. 1227, 1257 and 1258 of the [Puerto Rico] Civil Code" (id. ¶¶ 50-58); (3) "Damages under Art. 1060 of the Civil Code caused by deceit in the contracting process" and "damages pursuant to Art. 1054 of the Civil Code caused by breach of contract" (id. ¶¶ 59-66); (4) "Liability of the surety company(ies)" (id. ¶¶ 67-71); (5) "Liability of the insurers" (id. ¶¶ 72-74); (6) "Attorneys fees and litigation costs" (id. ¶¶ 75-77); and (7) "Legal interests" (id. ¶¶ 78-80).

[7] The 2012 Complaint, which concerns the first four contracts, pleads the following Causes of Action: (1) "Declaratory [j]udgment regarding 'alter ego', 'partner' or related entity [status] under Law 4[5]8 and its interpretive jurisprudence" (2012 Compl. ¶¶ 57-63); (2) "Declaratory judgment regarding nullification of contracts" (id. ¶¶ 64-69); (3) "Unilateral restitution of consideration under contract with an illegal cause caused by one of the contracting parties" (id. ¶¶ 70-75); (4) "Declaratory judgment due to lack of restitution" (id. ¶¶ 76-79); (5) "Damages" of not less than $5,000,000 for failure to inform PREPA of VSA's investigation and conviction (id. ¶¶ 80-82); (6) "Nullification of" the Second and Third Contracts (transferred from VSA to VIC) (id. ¶¶ 83-90); (7) "Nullification of transfer" of the First Contract (from VSA to VIC) (id. ¶¶ 91-95); (8) "Nullification due to deceit" of the first four Contracts (id. ¶¶ 96-102); and (9) "Costs and attorneys fees and interests" (id. ¶¶ 103-106).

2012-1174 (Nov. 28, 2012); Docket Entry No. 1-56.)[8] On September 16, 2019, VSA and VIC filed their Answers and Counterclaim.[9]

On July 31, 2020, VSA and VIC filed the Vitol Motion, seeking summary judgment on every Cause of Action in the 2009 and 2012 Complaints without clearly identifying the specific causes of action, and arguing (without referring to any specific affirmative defenses or counterclaims), that PREPA's requested forfeiture violates the Excessive Fines, Takings, and Due Process Clauses of the Constitution of the United States.[10] (Vitol Mot. at 1, 5.) VIC also seeks summary judgment on its Counterclaim against PREPA for breach of contract, alleging that PREPA has failed to pay for $28,489,560.16 of fuel oil (plus interest), an argument that corresponds to the first two Causes of Action in its Counterclaim for both declaratory relief and the collection of the unpaid amount. (Id. at 1, 45. See Answers and Counterclaim at 35-36.)

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[8] After this case underwent a volley of removals and remands, the Oversight Board filed claims against Vitol in federal court seeking to enforce the same contracts that PREPA here claims are null and void ab initio, thus waiving the forum selection clauses in those contracts, so that Vitol removed the case based on diversity jurisdiction and Title III of PROMESA on November 14, 2019. (Docket Entry No. 1.) The Court denied PREPA's motion to remand on March 13, 2020, finding diversity jurisdiction as well as jurisdiction under section 306 of PROMESA, after which the parties jointly proposed a summary judgment schedule. (Docket Entry No. 27 at 8-9.)

[9] In addition to raising a panoply of affirmative defenses (Answers and Counterclaim at 22-27, 60-62), the Answers and Counterclaim pleading contains the Counterclaim of VIC, which is subdivided into seven Causes of Action: (1) "Declaratory judgment" that the Fifth and Sixth Contracts are valid and enforceable (id. at 35); (2) "Collection of money" in the amount of $28,489,560.16 plus interest for amounts owed on delivered fuel (id. at 35-36); (3) "Damages" in an undetermined amount for losses incurred during the period in which VIC was suspended from the Registry of Bidders (id. at 36-37); (4) "Attorneys fees and costs of the litigation" (id. at 37); (5) "Legal interests" (id.); (6) "Inverse condemnation" for the remaining fuel taken without compensation (id. at 38); and (7) "48 U.S.C. § 1983 – illegal taking without just compensation in violation of the Fifth Amendment of the Constitution of the United States" (id. at 38-39).

[10] VIC and VSA assert in their affirmative defenses that the remedy PREPA seeks would violate the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. (Answers and Counterclaim at 23-25, 61.)

On November 9, 2020, the Oversight Board filed the PREPA Motion, seeking summary judgment on Causes of Action 1 and 2 of the 2009 Complaint; Causes of Action 1, 2, 3, 4, 5, 6, and 8 of the 2012 Complaint; and Causes of Action 1, 2, 3, 6, and 7 of VIC's Counterclaim. (PREPA Mot. at 1.) On February 8, 2021, VSA and VIC filed the Vitol Opposition and Reply and, on March 12, 2021, the Oversight Board filed the PREPA Reply.

II.

DISCUSSION

The Cross-Motions each seek summary judgment under rule 56(a) of the Federal Rules of Civil Procedure, made applicable to this Adversary Proceeding by section 310 of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[11] and rules 7056 and 9014 of the Federal Rules of Bankruptcy Procedure. 48 U.S.C. § 2170. VSA and VIC seek summary judgment on all Causes of Action in the 2009 and 2012 Complaints, arguing that they are cumulatively predicated on two theories of liability (under Law 458 and under Commonwealth statutes invalidating contracts tainted by "deceit" or "illicit consideration") which must fail. (Vitol Mot. at 3.)[12] Thus, VIC argues, its contracts with PREPA were valid and it is entitled to recover an unpaid total of $28,489,560.16 for fuel oil plus interest. (Id. at 45.)

PREPA seeks summary judgment on its Causes of Action alleging liability under Law 458 (roughly corresponding to 2009 Complaint Cause of Action 1 and 2012 Complaint Causes of Action 1 and 2) and for deceit, illegal cause, or turpis causa, and resulting statutory damages (roughly corresponding to 2009 Complaint Cause of Action 2 and 2012 Complaint

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11 PROMESA is codified at 48 U.S.C. § 2101 et seq.

12 In arguing that PREPA's requested remedy violates the Excessive Fines, Takings, and Due Process Clauses, VSA and VIC appear to be seeking summary judgment on various affirmative defenses to that effect, as well as Counterclaim Cause of Action 7, which concerns the Takings Clause argument. (Answers and Counterclaim at 23-25, 61, 38-39.)

Cause of Action 3, 6, 8).[13] PREPA also seeks summary judgment rejecting Vitol's numerous affirmative defenses including, but not limited to, the following: that PREPA's claims are time-barred, that PREPA failed to exercise due diligence or mitigate damages, that PREPA would be unjustly enriched, that Vitol is owed additional damages, and that PREPA's requested relief would violate the Excessive Fines, Takings, or Due Process Clauses of the Constitution of the United States. Finally, PREPA seeks summary judgment in its favor with respect to VIC's Counterclaim Causes of Action 1, 2, and 7, which seek a declaration that the contracts were valid, payment of the $28,498,560.16 still owed (plus interest), and a finding of a taking without just compensation in violation of the Takings Clause, respectively.

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that "possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and [] must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted).

PREPA's claims largely turn on the proposition that Law 458 or theories of deceit or illicit consideration give rise to viable Causes of Action under the facts presented, and the Court therefore begins its analysis with those issues.

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[13] PREPA also requests a declaratory judgment that Vitol is not entitled to restitution, and PREPA likewise requested damages in its 2012 Complaint of not less than $5,000,000. (2012 Complaint Causes of Action 4, 5).

A. Causes of Action Relating to Law 458

Having considered the parties' arguments carefully, the Court concludes that Law 458 does not give rise to any viable Causes of Action, because the undisputed factual record could not support a determination that VIC was ever the same "juridical person" as VSA at any time relevant to the Fifth and Sixth Contracts, nor could it support a determination that VIC was ever an alter ego of VSA at any time relevant to any of the Contracts and, in any event, VSA's conviction was for a crime whose constitutive elements were not sufficiently equivalent to the Puerto Rico crime of "aggravated misappropriation" to implicate the provisions of Law 458 that depend on section 928b. 3 L.P.R.A. §§ 928a-b. The Court's reasoning is as follows:

1. VIC Was a Subsidiary of VSA Until December 2007, But Never an Alter Ego

For purposes of determining Vitol's potential liability under Law 458, it is crucial to determine whether VIC and VSA were members of the same "juridical person" within the meaning of section 928a, which provides that "the term 'juridical person' includes corporations . . . that constitute, for these purposes, the alter ego of the juridical person or subsidiaries thereof." 3 L.P.R.A. § 928a (emphasis added). Although the parties disagree as to the date when VIC became a subsidiary of VSA, the parties do not dispute that VIC was a subsidiary of VSA from January 1, 2007, the date on which VSA bought all of VIC's shares (PREPA SUF Reply ¶¶ 16-17, 23-25), until December 28, 2007, the date on which VSA sold all of VIC's shares to Vitol Holding Sàrl (id. ¶ 96). For that period, then, VSA and VIC constituted the same juridical person, by virtue of their parent-subsidiary relationship. VSA's December 10, 2007, conviction for grand larceny in the first degree under New York Penal Law § 155.42 occurred within the period during which VIC was a subsidiary of VSA, while the first four contracts were in effect

but before the last two were executed. (Id. ¶¶ 81, 96.) The effects under Law 458 of the VSA conviction on the first four Contracts are explained below, in Parts II.A.2 and II.A.3.

In determining whether VIC was ever an alter ego of VSA, the Court must first consider which jurisdiction's law governs the Court's analysis of alter ego relationships. In cases like this involving diversity jurisdiction, "[i]n determining what state law pertains, the court must employ the choice-of-law framework of the forum state," here, Puerto Rico. Crellin Techs., Inc. v. Equipmentlease Corp., 18 F.3d 1, 4 (1st Cir. 1994); Wadsworth, Inc. v. Schwarz-Nin, 951 F. Supp. 314, 320 (D.P.R. 1996). Since the matter of alter ego relationships turns on a question of the internal affairs "of the corporation, the law presumptively applied is the law of the place of incorporation." Wadsworth, 951 F. Supp. at 320 (internal quotation marks and citation omitted). Taken more broadly, "[t]he choice of law principle recognized in *Wadsworth* is the 'internal affairs' doctrine. Under this doctrine, which applies the law of the state of incorporation to cases involving corporate governance, Delaware law would apply" to this case, because VIC is a Delaware corporation.[14] TC Investments, Corp. v. Becker, 733 F. Supp. 2d 266, 282 (D.P.R. 2010) (internal quotation marks and citations omitted).[15]

Because Delaware law governs whether an alter ego relationship existed between VSA and VIC, in order to demonstrate that VIC is VSA's alter ego, PREPA must show that (1)

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[14] Since it is the internal affairs of VIC (rather than those of VSA, VIC's then-shareholder) that bear on the alter ego question, it is inconsequential that VSA was incorporated as a société anonyme under Swiss law on March 2, 1972. (PREPA SUF Reply ¶ 8.)

[15] To the extent the instant case differs from Wadsworth, which involved allegations of fraud rather than an alter ego relationship, the question of whether an alter ego relationship exists here is logically antecedent to (and determinative of) whether a fraud or deceptive act was committed in Puerto Rico, not the other way around. Thus, Delaware law applies. This conclusion is bolstered by the fact that "Puerto Rico corporate law was modeled after Delaware corporate law." Becker, 733 F. Supp. at 282. Nor do the parties dispute that Delaware law and Puerto Rico law are similar with respect to standards for identifying alter ego relationships. (See PREPA Mot. at 27 n.19.)

VSA and VIC operated as a single economic entity, and (2) that an overall element of injustice or unfairness is present. See Trevino v. Merscorp, Inc., 583 F. Supp. 2d 521, 528 (D. Del. 2008). The Court examines the seven factors set forth in the Third Circuit's Pisani decision to determine whether VSA and VIC operated as a single economic entity. While Pisani is largely ignored in PREPA's submissions (see PREPA Mot. at 28-29 & n. 21), the Court finds its application here persuasive and appropriate, as it has been relied upon within the District of Delaware in applying Delaware law.[16] Trevino, 583 F. Supp. 2d at 528-29 (citing United States v. Pisani, 646 F.2d 83, 88 (3d Cir. 1981)). Those factors are: "(1) undercapitalization; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) [whether] the corporation is merely a façade for the operations of the dominant stockholder or stockholders." Id.[17] PREPA has not framed a genuine material factual dispute as to any of the seven factors.

First, PREPA does not genuinely dispute that VIC has never been undercapitalized. (Vitol Mot. at 18-19. See also Vitol Opp. & Reply at 9-10; Vitol SUF Reply

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16 See, e.g., Laifail, Inc. v. Learning 2000, Inc., Nos. C.A.01-599 GMS, C.A.01-678 GMS, 2002 WL 31667861, at *11 (D. Del. Nov. 25, 2002).

17 The Pisani Court crafted a "'federal rule' for application of the alter ego doctrine . . . because the case involved application of a *federal* statute," and did not purport to establish a test in Delaware, see Fid. Nat'l Info. Servs., Inc. v. Plano Encryption Techs., LLC, 2016 WL 1650763, at *4 n.6 (D. Del. Apr. 25, 2016) (emphasis in original), and so this Court relies on the Pisani factors advisedly. Nevertheless, to the extent applicable state law may differ, the five factors considered in Delaware jurisprudence correspond to Pisani factors (1), (4), (2), (5), and (7), respectively, and to the extent Pisani adds factors concerning dividends and corporate records, these are helpful indicia not in conflict with Delaware's less expansive list of factors. See Case Fin., Inc. v. Alden, Civil Action No. 1184-VCP, 2009 WL 2581873, at *4 (Del. Ch. Aug. 21, 2009); Sprint Nextel Corp. v. iPCS, Inc., Civil Action No. 3746-VCP, 2008 WL 2737409, at *11 (Del. Ch. July 14, 2008).

¶ 27.) Second, PREPA does not dispute that VIC has always observed corporate formalities: VIC "had its own directors and officers, its own bank accounts, and its own credit facilities;"[18] "VIC's board of directors manages the company through independent board resolutions;" VIC "pays its own expenses and its own employees' salaries;" VIC "files its own tax returns;" and "[w]hen VIC does business with VSA, it transacts at arms-length and at fair market prices, without any special internal transfer pricing, just as when VIC does business with unrelated companies." (Vitol Mot. at 19. See also Vitol Opp. & Reply at 9-10.)[19] To be sure, PREPA argues that "VIC's directors and officers were employees of VSA, and many held titles at VIC similar or identical to their titles at VSA;" that "VIC's contact information, management team, street address, and credit and insurance providers remained the same as while conducting busines under the VSA name;" and that "VSA maintained pervasive control of VIC." (PREPA Mot. at 29-30. See also PREPA Reply at 3.) Apart from the generalized allegation that VSA pervasively controlled VIC, however, none of these statements is directly responsive to the first three Pisani factors.

As to the fourth, fifth, and sixth factors, PREPA does not dispute that VIC has always been solvent, that VSA has never siphoned funds from VIC, and that VIC has its own

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[18] Some individuals who were officers of VIC were also officers of VIN for the period between October 2006 (when VIC agreed to sell its shared to VSA) and January 2007 (when VSA agreed to buy VIC's shares). (Vitol SUF Reply ¶¶ 4, 11, 21; PREPA SUF Reply ¶ 27.)

[19] PREPA even admits that "VSA contracted with VIC to act as its agent in continuing the ongoing U.S. business activities that could not be transferred to VIC. Other than these exceptions, VIC took over all of the U.S. business formerly conducted by VSA under the doing business name of VIN." (PREPA Mot. at 16 n.16.) Such behaviors suggest that care was taken to observe corporate formalities, even as VSA's U.S. portfolio was being transferred to VIC.

corporate records "maintained by its corporate secretary." (Vitol Mot. at 19; Vitol Opp. & Reply at 9.)

As for the seventh and final factor, PREPA has not framed a genuine factual dispute as to whether VIC is a "mere façade" for VSA, as the undisputed facts show that legitimate business purposes informed the reorganization decision whereby VIC would lead operations in the United States (previously operated by VSA dba VIN), while VSA primarily focused on other operations, and PREPA has made only conclusory assertions to the contrary. (Vitol Mot. at 19; Vitol Opp. & Reply at 2, 9; Vitol SUF Reply ¶¶ 7-8, 17-20; PREPA SUF Reply ¶¶ 11, 13-15, 20, 22, 25-27.)

At the heart of PREPA's alter ego theory is the allegation that the Vitol group underwent a corporate reorganization for the purpose of protecting VSA and VIC from legal liabilities incurred by one another. Specifically, PREPA alleges that the reorganization from a branch structure to a corporate structure abruptly coincided with VSA's bribery investigation and that, by implication, no legitimate business purpose informed the reorganization apart from attempts to shield Vitol group members from liability. (PREPA Mot. at 17.) PREPA also points out the close timing between VSA's November 2007 guilty plea and VSA's sale of VIC to Vitol Holding Sàrl in December 2007 (see PREPA Reply at 3), as well as the letter sent by VSA and VIC in August 2007 to the Internal Revenue Service expressing a desire to limit legal liability exposure between U.S. and non-U.S. operations and, in particular, expressing concern that VSA may be exposed to litigation involving VIC absent a corporate restructuring (PREPA SUF Reply ¶ 98). PREPA further cites an August 2005 email chain among top Vitol executives expressing concerns about whether the Vitol group should be reorganized, citing "all our recent problems (congo /irs etc)" as reasons they might "reconsider whether we should continue with a branch

office in the us as opposed to a separate company." (PREPA Mot. at 17 (quoting PREPA SUF Reply ¶ 15).) Absent more, however, these factors do not substantiate an alter ego theory or refute the assertion that the reorganization was for a legitimate business purpose.

To the extent the reorganization was motivated by a desire to minimize legal liability, such a purpose is legitimate. See Trevino, 583 F. Supp. 2d at 530 (quoting Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 269 (D. Del. 1989) ("Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific [legal violation], the cause of justice does not require disregarding the corporate entity.")). Ultimately, PREPA does not show in its motion practice or in any of the material facts, disputed or undisputed, that the purpose of restructuring was motivated by the desire to shield the Vitol group from a specific legal violation, let alone one arising from Vitol's contracts with PREPA. Nor do PREPA's citations to the email exchange in August 2005 raise any genuine issue of material fact as to an intent to evade liabilities from any specific legal violation, any more than to protect the Vitol group going forward. (See PREPA SUF Reply ¶ 15.) Thus, PREPA has failed to show that a rational fact finder could conclude on this record that VIC was ever an alter ego of VSA: not only has PREPA failed to demonstrate that the Pisani factors are satisfied, nothing in the record suggests that VSA and VIC operated as a single economic entity or that the Pisani factors have been met.[20] The Court thus grants the Vitol

[20] To the extent PREPA relied, for the first time in its reply, on a statement in a 2020 Deferred Prosecution Agreement between Vitol and the Department of Justice that VSA "directly owned and controlled" VIC from 2004 to 2009 (see Docket Entry No. 61-1 ¶ 2 (emphasis added)), the statement is insufficient to frame a genuine issue of material fact as to alter ego status because the Department of Justice has allowed Vitol to correct that statement, to reflect that the relevant period of ownership and control was from 2004 to 2007 (see Docket Entry Nos. 67 and 68), and nothing in PREPA's submission indicates that the term "control" refers to anything more than the degree and kind of control that would be expected of a parent with respect to a subsidiary.

Motion for summary judgment dismissing the alter ego component of Cause of Action 1 in both the 2009 Complaint and 2012 Complaint. (Vitol Mot. at 17 & n.9.)

2. VSA's Conviction Did Not Trigger Law 458's Debarment Provision

Liability under sections 928 or 928c of Law 458 is largely dependent on proof of a predicate conviction[21] for a crime listed in section 928b or, as relevant here, "for [a] crime[] whose constitutive elements are equivalent to those" listed in section 928b. 3 L.P.R.A. § 928b.[22] The Court will now consider whether VSA's conviction on December 10, 2007, of grand larceny in the first degree under New York Penal Law § 155.42 constituted a conviction of a crime equivalent to "[a]ggravated misappropriation," which the parties agree is the most relevant Puerto Rico offense listed in section 928b. (PREPA SUF Reply ¶ 81; Vitol Mot. at 21 n.12; PREPA Mot. at 5, 24-27; 3 L.P.R.A. § 928b(1).)

The parties agree that the "aggravated misappropriation" contemplated by section 928b of Law 458 is currently defined by Puerto Rico's larceny statute (Vitol Mot. at 21 n.12;

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[21] Only section 928f requires contract bidders and awardees to disclose investigations, and it does not impose liability for failure to do so. 3 L.P.R.A. § 928f. By contrast, the provisions which impose liability are concerned with entities that were "convicted of, or ha[ve] pled guilty to, committing a crime" identified in section 928b (3 L.P.R.A. § 928), and the specific remedy of rescinding contracts applies only to entities "convicted or found guilty" of such crimes (3 L.P.R.A. § 928c), not those merely under investigation.

[22] Significantly, section 928b concludes its list of crimes with the following clause: "For the purposes of the federal jurisdiction, that of the states and territories of the United States, or of any other country, the prohibition set forth in this chapter shall apply in cases of convictions for crimes whose constitutive elements are equivalent to those of the above stated crimes." 3 L.P.R.A. § 928b. As such, section 928b is only implicated by a conviction under the laws of a national entity or subdivision thereof, but not by the finding of an international organization. Thus, the finding in the UN Report of October 27, 2005, does not rise to the level of a "conviction for a crime," let alone an equivalent crime, or one committed in a "federal jurisdiction, that of the states and territories of the United States, or of any other country" within the meaning of the statute. 3 L.P.R.A. § 928b.

PREPA Mot. at 26),[23] which provides that "[a]ny person who without violence or intimidation illegally takes personal property belonging to another shall commit the crime of larceny and shall incur a misdemeanor." 33 L.P.R.A. § 4820. The New York crime of which VSA pleaded guilty, grand larceny in the first degree, is defined as follows: "[a] person is guilty of grand larceny in the first degree when he steals property and when the value of the property exceeds one million dollars." N.Y. PENAL LAW § 155.42.

Although PREPA disputes the propriety of comparing the elements of these two laws and argues that such a comparison is not required (PREPA Mot. at 26), section 928b plainly requires the analysis of "constitutive elements" of crimes that are not specifically listed in section 928b to determine whether a crime under the law of another jurisdiction is equivalent to one listed in section 928b. 3 L.P.R.A. § 928b. Even though PREPA argues that Puerto Rico's larceny statute would "encompass bribing Iraqi government officials to receive contracts under the OFF Program" (PREPA Mot. at 26), PREPA has not shown that the "constitutive elements" of the New York and Puerto Rico crimes are "equivalent" as required by section 928b, or that VSA could have been found guilty in Puerto Rico of aggravated misappropriation based on the conduct that violated New York's penal law.[24]

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[23] The crime of "aggravated misappropriation" was formerly codified at 33 L.P.R.A. § 4272, which has since been repealed. Annotations to the former version of the statute explain that "[a]ppropriation by [a] person, without violence or intimidation, of personal property belonging to another person constitutes unlawful appropriation. When, among other circumstances specified in [the] Penal Code, appropriated property has value in excess of $200, appropriation is considered aggravated." 33 L.P.R.A. § 4271.

[24] It is not entirely clear whether PREPA alleges that the grand larceny (resulting from the bribery of officials in circumvention of a UN requirement that payments be made through a UN trust account established by the OFF Program for the benefit of the Iraqi people) ultimately harmed the UN trust account or whether PREPA contends that the scheme constituted the taking of property belonging to the Iraqi people who were thereby deprived of the benefit of the OFF Program and the value of their oil. According to Vitol, the "purported victim" of the New York crime of grand larceny was a UN trust

Several elemental differences distinguish Puerto Rico's larceny statute from New York's grand larceny statute. First, whereas Puerto Rico requires a showing that the defendant "actually transferred" personal property belonging to another, it suffices under New York law to show that property was wrongfully withheld from another. Compare Coll. of Dental Surgeons of P.R. v. Triple S Mgmt., Inc., Civil No. 09-1209(JAF), 2011 WL 3862419, at *2 (D.P.R. 2011) ("The Supreme Court of Puerto Rico has emphasized that an illegal appropriation has not occurred unless a defendant has actually transferred another's personal property into his possession.") with N.Y. PENAL LAW § 155.05(1) ("A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." (emphasis added)). As relevant here, VSA's larceny under New York law amounted to withholding its own funds that were supposed to have been paid into the OFF Program's trust

account established by the OFF Program (Vitol Mot. at 22), since "all direct purchasers of oil were required to pay the price specified in their crude oil purchase contracts directly into a United Nations trust account" (Plea Agreement, Docket Entry No. 50-32 ¶ 3.a), out of which development aid is disbursed to meet the humanitarian and development needs of the Iraqi people (see, e.g., Docket Entry Nos. 50-35, 50-50; S.C. Res. 986, paras. 1(a)-(b), 8, U.N. Doc. S/RES/986 (Apr. 14, 1995); U.N. Secretary-General, Letter dated 20 May 1996 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1996/356 (May 20, 1996)). PREPA asserted at oral argument that, because the Plea Agreement imposed "restitution of thirteen million dollars ($13,000,000.00) to the Iraqi people" (Plea Agreement, Docket Entry No. 50-32 ¶ 3.b (emphasis added)), and because VSA's misconduct essentially amounted to bribing Iraqi officials to avoid paying money into a UN trust account set up for the benefit of the Iraqi people, VSA was effectively "taking money from the Iraqi people" or the "public funds of Iraq." (April 29, 2021 Hr'g Tr., Docket Entry No. 70 at 50:7-23.) It appears from the undisputed facts, however, that even if the UN trust or the Iraqi people were ultimately harmed, the nature of the larceny under New York law was that VSA withheld money from the OFF Program (and the corresponding UN trust account), and that the nature of the property at issue was an intangible right to receive funds rather than the taking of tangible property from the possession of another. (See Docket Entry Nos. 50-35, 50-36.)

account, and using those funds instead to pay for oil secured through bribery of Iraqi officials and third parties. VSA did not, however, transfer the personal property of another into its possession, as required to satisfy the elements of the Puerto Rico larceny statute.

Second, whereas Puerto Rico narrowly defines "property" as "personal property" that can be "transferred" while omitting any reference to intangible rights, New York law defines property to include intangible rights such as "evidence of debt or contract." Compare Coll. of Dental Surgeons of P.R., 2011 WL 3862419, at *2-3; and 33 L.P.R.A. § 4642(g) with N.Y. PENAL LAW § 155.00(1).[25] This distinction is relevant where, as here, a defendant did not actually transfer property belonging to another to itself, but rather prevented the holder of an intangible right to money from obtaining that money. The undisputed facts indicate that VSA deprived another, be it the UN trust or the Iraqi people as beneficiaries of the UN trust, of the right to money that VSA wrongfully transferred to recipients of bribes, implicating the New York, but not the Puerto Rico, larceny prohibition. (Vitol Mot. at 22; Plea Agreement, Docket Entry No. 50-32 ¶¶ 3.a-b; Docket Entry Nos. 50-35, 50-36, 50-50; S.C. Res. 986, paras. 1(a)-(b), 8, U.N. Doc. S/RES/986 (Apr. 14, 1995); U.N. Secretary-General, Letter dated 20 May 1996 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1996/356 (May 20, 1996); April 29, 2021 Hr'g Tr., Docket Entry No. 70 at 50:7-23.)

Third, whereas Puerto Rico emphasizes legal ownership by defining illegal appropriation with reference to "property belonging to another," which VSA's misconduct did

[25] Although Vitol rightly emphasizes the distinction between New York law (which recognizes property in intangible rights), and Puerto Rico law (which defines property more narrowly in terms of personal property) (Vitol Mot. at 21-22), PREPA does not meaningfully dispute this component of Vitol's categorical approach, but merely questions unpersuasively the relevance of the categorical method altogether (PREPA Mot. at 26-27).

not involve, in New York it suffices to deprive someone of a superior right of possession, which VSA did. Compare N.Y. PENAL LAW § 155.00(5) (defining "owner" as a "person who has a right to possession thereof superior to that of the taker, obtainer or withholder.") with 33 L.P.R.A. § 4820 (describing personal property belonging to another).

Fourth, whereas a Puerto Rico defendant must transfer property from the victim to himself to make it his own, which VSA did not do, New York also punishes defendants for transferring property to a third person, as VSA did when it paid kickbacks to Iraqi officials and third parties. Compare 33 L.P.R.A. § 4642(d) with N.Y. PENAL LAW §§ 155.05(1), 155.00(4).

As a result of these elemental differences, PREPA fails to show that the constitutive elements of VSA's offense in New York were sufficiently equivalent to satisfy the requirements of section 928b of Law 458. Since the elements of the New York offense of grand larceny in the first degree and the Puerto Rico offense of aggravated misappropriation differ in several material respects, the Court cannot conclude that the conduct which led to a conviction under New York law would have implicated an "aggravated misappropriation" or "larceny" within the meaning of Puerto Rico law, particularly when those elemental differences suggest (on the limited record available to the Court), that VSA could not have been convicted in Puerto Rico for aggravated misappropriation for the conduct that gave rise to its conviction in New York. Having concluded that PREPA has failed to establish an alter ego relationship between VIC and VSA, and having determined that VSA's conviction in New York for grand larceny in the first degree does not implicate section 928b of Law 458, the Court will now consider whether any Cause of Action or remedy is available to PREPA under the various provisions of Law 458.

3. No Cause of Action or Remedy is Available Under Law 458

The Court now considers the various provisions of Law 458 advisedly, since PREPA's arguments regarding relief have evolved since these actions were initiated and do not correspond precisely to the claims it asserted in its Complaints.[26] Nevertheless, in the interest of completely analyzing Law 458, which is discussed extensively in the 2009 Complaint, and out of an abundance of caution, the Court will apply the terms of each subsection to all six Contracts.

Section 928 does not provide a basis for any viable claim by PREPA against Vitol on this record because that statute prohibits the future award of contracts to a "juridical person who has been convicted of, or has pled guilty to, committing a crime involving fraud, embezzlement, or misappropriation of public funds listed in § 928b of this title . . . ." 3 L.P.R.A. § 928. Because VSA's guilty plea and conviction for grand larceny in the first degree under New York law does not implicate the crimes listed in section 928b, the prohibition set forth in section 928 is inapplicable to the fuel supply contracts at issue here. Moreover, given VSA's conviction date of December 10, 2007, the forward-looking prohibition of section 928 could only apply, if at all, to the Fifth and Sixth Contracts, which were awarded after VSA's conviction. (PREPA SUF Reply ¶¶ 37, 81.) Furthermore, the Sixth Contract (and possibly even the Fifth Contract), was awarded after VIC ceased to be a subsidiary of VSA, and PREPA has not demonstrated that VIC was an alter ego of VSA at any time relevant to this litigation. Put differently, even if section 928b were implicated, section 928 could only apply to the Fifth

[26] Indeed, at the hearing, counsel for Vitol correctly pointed out that PREPA's alleged bases for relief in the PREPA Motion have shifted beyond the Complaints. For example, "PREPA does not . . . have a claim for relief under the reimbursement penalty of 928(c). There is no cause of action for the 928(c) reimbursement penalty in either complaint, not even a mention of that provision of 928(c)." (April 29, 2021 Hr'g Tr., Docket Entry No. 70 at 28:4-8.) Moreover, "there is no common law claim for restitution or disclosure [sic] of any type in either complaint in this case, nor is there a cause of action for the gross profit that is now alluded to as sort of a lesser form of relief in the reply brief, Your Honor." (Id. at 29:7-11.)

Contract, since VIC was a subsidiary ("juridical person") of VSA only until December 28, 2007, when VSA sold all its VIC shares to Vitol Holding Sàrl. (Id. ¶ 96.) The Fifth Contract was awarded to VIC that same day (id. ¶ 37), and the Sixth Contract was awarded on December 23, 2008 (id.). Thus, at the time the parties entered into the Sixth Contract, VIC was not even a "juridical person" in relation to VSA for purposes of section 928's prohibition on awarding contracts to juridical persons that have pleaded guilty to an offense listed in section 928b. In any event, to the extent that VIC might have been a juridical person momentarily after the Fifth Contract was awarded, the fact that VSA's conviction did not implicate section 928b means that the contract was not prohibited by section 928.

Section 928c is inapplicable, for substantially the same reasons. Section 928c is only implicated by "[t]he conviction or guilt of any of the crimes listed in § 928b of this title," (here, as explained above, there was none) and, even then, the penalty available is the "automatic rescission of all contracts in effect on said date between the person convicted or found guilty and any agency or instrumentality of the Commonwealth government, public corporation, municipality, the Legislative Branch or the Judicial Branch of Puerto Rico." 3 L.P.R.A. § 928c (emphasis added). Given that "juridical person" is a defined term within Law 458, the Court construes the omission of that term and use instead of the term "person" in section 928c to be intentional. See, e.g., Barnhart v. Sigmon Coal Co., 534 U.S. 438, 454 (2002) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). Since PREPA has failed to demonstrate the existence of an alter ego relationship between VSA and VIC that could suggest they were one and the same person as a legal matter, there is no basis in this record for a

determination that VIC was "the person convicted," let alone of an offense equivalent to the crimes listed in section 928b.[27]

Finally, Law 458 creates no remedy for a violation of section 928f, nor do the Complaints seek relief thereunder, so even if VSA dba VIN or VIC violated the certification requirement set forth in section 928f, PREPA has not shown that it is entitled to relief on that basis. Accordingly, the Court grants summary judgment to Vitol (and denies the same to PREPA) with respect to Cause of Action 1 of the 2009 Complaint, and with respect to Causes of Action 1 and 2 of the 2012 Complaint. The Court will now consider whether PREPA or Vitol is entitled to summary judgment as to PREPA's deceit- or immorality-based Causes of Action against VIC or VSA dba VIN.

B. Deceit-Based Causes of Action

For the reasons that follow, the Court concludes that PREPA's Causes of Action based on theories of deceit (or dolo) and illicit consideration (or turpis causa) cannot be sustained as a matter of law, because VIC's certifications were true and, to the extent VSA dba VIN made false certifications, such deceit was incidental and did not serve to vitiate PREPA's consent.

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[27] VSA learned of the NYDA investigation in November 2005 (see PREPA SUF Reply ¶¶ 76-79). The investigation resulted in a plea agreement on November 20, 2007 (id. ¶¶ 80, 82-84), and a conviction on December 10, 2007 (id. ¶ 81). Taking the conviction as the relevant date for purposes of applying the term "person convicted or found guilty" in section 928c, the Second, Third, and Fourth Contracts were in effect on November 20, 2007 (id. ¶ 37), but the Second and Third Contracts had been transferred to VIC as of January 1, 2007 (id. ¶¶ 25, 41-43, 46-47), and they were executed by VIC on January 23, 2007 (id. ¶ 37). The Fourth Contract had been awarded to VIC (and not VSA) on June 5, 2007 (id. ¶¶ 37, 50). Thus, not only was the conviction not for a crime listed in section 928b, section 928c does not apply to prohibit the Second, Third, and Fourth Contracts. Since section 928c only applies to the "person convicted or found guilty," without using the term "juridical person," VSA's guilty plea and conviction have no bearing on the Second, Third, and Fourth Contracts for purposes of section 928c.

A contract in Puerto Rico may be nullified by the serious deceit of a contracting party, since "[c]onsent given by error, under violence, by intimidation, or deceit shall be void." 31 L.P.R.A. §3404. See also 31 L.P.R.A. §§ 3391, 3511. "There is deceit when by words or insidious machinations on the part of one of the contracting parties the other is induced to execute a contract which without them he would not have made." 31 L.P.R.A. § 3408. Such deceit rises to the level of "serious deceit." Dopp v. HTP Corp., 755 F. Supp. 491, 495-96 & n.4 (D.P.R. 1991), vacated on other grounds, 947 F.2d 506 (1st Cir. 1991).

In Puerto Rico, a contract with illicit consideration has no effect whatsoever, and consideration is illicit if it is contrary to law (or illegal) or to good morals. See, e.g., Santiago v. Santiago, 731 F. Supp. 2d 202, 207 (D.P.R. 2010). That is, "*consideration is illegal not only when the contract is barred per se, but when as a result thereof there is an intent to cause damage or harm to another party* . . . , when there is an intent to commit fraud." Dennis v. City Fed. Savs. & Loan Ass'n, 21 P.R. Offic. Trans. 186, 207 (1988) (emphasis in original). Under Article 1257 of the Puerto Rico Civil Code, when the nullity arises from a "crime or misdemeanor on the part of only one of the contracting parties," then "the one who is not guilty may recover what he may have given, and shall not be bound to fulfill what he may have promised." 31 L.P.R.A. § 3516. Article 1258 of the Puerto Rico Civil Code provides that, "[i]f the fact of which the illicit consideration consists does not constitute either a crime or misdemeanor," and "[w]hen only one of the contracting parties is guilty, he cannot recover what he may have given by virtue of the contract, nor demand the fulfillment of what may have been offered him. The other party, who has had nothing to do with the illicit consideration, may

reclaim what he may have given without being obliged to fulfill what he has offered." 31 L.P.R.A. § 3517.[28]

1. VIC's Certifications Were Truthful

To the extent PREPA's remaining Causes of Action allege variations on theories of deceit and illicit consideration, the leitmotif of them all is that VIC deceived PREPA when it represented (or failed to dispel any impression) that, at times relevant to the execution of fuel supply contracts, VIC had no knowledge of being under investigation, or of having been convicted or pleaded guilty in a United States jurisdiction for violations of section 928b. The two fatal flaws in PREPA's argument are that VSA's guilty plea and conviction were not for a crime equivalent to aggravated misappropriation under section 928b, and that, to the extent VSA had been investigated, PREPA has neither established that VIC was ever an alter ego of VSA, nor that liability would attach to VIC on account of VSA's investigation absent an alter ego relationship.[29] Thus, VIC's certifications, which could have had a bearing on all Contracts but

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[28] Vitol also argues, and PREPA disputes, that "Article[s 1257 and] 1258 ha[ve] been repealed by the new [2020] Civil Code for Puerto Rico," which allegedly establishes new provisions that apply to "a civil penalty or the privation of rights" whenever the new law is more "benign," and since Articles 346 and 347 of the 2020 Puerto Rico Civil Code are more benign, Vitol argues, those effectively replace Articles 1257 and 1258. (Vitol Opp. & Reply at 23-27 & n.34. See also PREPA Reply at 10-11.) Moreover, the parties dispute whether section 928g of Law 458 even allows instrumentalities to seek remedies otherwise available in the Puerto Rico Civil Code (see PREPA Reply at 11-12). Even assuming that PREPA is correct that Articles 1257 and 1258 are applicable here, and that instrumentalities are entitled to look beyond Law 458's remedies to those provided in the Civil Code of Puerto Rico, its arguments are unavailing for the reasons set forth below, namely, that VIC's certifications were truthful (given the proper interpretation of section 928b), and that, to the extent VSA made any false statements, those statements do not defeat consideration as a matter of law.

[29] To the extent juridical person is defined as including "the alter ego of the juridical person or subsidiaries thereof" 3 L.P.R.A. § 928a, the term "subsidiaries" in the context of section 928f appears to refer to subsidiaries of the "juridical person who wishes to participate in the award of bids or contracts" 3 L.P.R.A. § 928f, and would therefore refer to any subsidiaries of VIC, rather than subsidiaries of VSA.

the First Contract, were all true. The undisputed factual record before the Court demonstrates that at no point had VIC, the "Seller," been convicted of or pleaded guilty to a crime listed in Law 458, nor had it any knowledge of being under judicial, legislative or administrative investigation in Puerto Rico, the United States, or in any other country.[30] Thus, VIC's certifications and sworn statements were not deceitful, and therefore, because no harm resulted from VIC's true statements, PREPA has no viable Cause of Action for dolo or for illicit consideration against VIC with respect to the Second, Third, Fourth, Fifth, and Sixth Contracts and Vitol is entitled to judgment dismissing those aspects of its claims as a matter of law.

2. VSA's Misstatements Do Not Defeat Consideration Under the First Contract

By contrast, VSA dba VIN issued sworn statements that Vitol was unaware of any investigations, at least as early as February 28, 2006 and as late as December 28, 2006, but there is no dispute that the New York County District Attorney issued subpoenas to VSA dated November 22, 2005 and January 26, 2006. (PREPA SUF Reply ¶ 79; Docket Entry No. 50-10 ¶¶ 4-6. See also Docket Entry No. 43-16 at 8-9, 12.) Vitol did not dispute that such statements were knowingly false, when given the opportunity to do so at oral argument, but it instead argued that the New York investigation was outside the scope of section 928b (and therefore Law 458), and that the sworn statement at issue was submitted months after the First Contract was executed and nearly a year before the Second Contract was executed, proving that the statement itself was

[30] Notwithstanding the recent Department of Justice investigation (see supra note 20), VIC's undisputed certifications and attestations were true for all known certifications and attestations relevant to the instant case, since the last of VIC's sworn statements were referenced within the Sixth Contract in December 2008 (PREPA SUF Reply ¶ 60; Docket Entry No. 50-11; Docket Entry No. 38-7, art. XII), and the investigation by the Department of Justice occurred over a decade later, concerning misconduct by VIC occurring roughly between 2005 and 2020. (Statement of Facts, Docket Entry No. 61-1 ¶¶ 25, 55.)

not made in connection with the award or execution of any of the contracts at issue. (April 29, 2021 Hr'g Tr., Docket Entry No. 70 at 23:14-24:17.)

The question thus becomes whether the false statement invalidated any Contracts. Because consent is the lynchpin of a binding contract, the required showing is significant. Under 31 L.P.R.A. § 3391, "[t]here is no contract unless" it has "[t]he consent of the contracting parties." Under 31 L.P.R.A. § 3511, "[c]ontracts containing the requisites mentioned in § 3391 of this title may be annulled . . . whenever they contain any of the defects which invalidate them according to law." As previously noted, "[c]onsent given by error, under violence, by intimidation, or deceit shall be void." 31 L.P.R.A. § 3404. At issue, then, is whether VSA's deceit was so serious that it vitiated PREPA's consent.

The First Contract was executed on August 22, 2005 (PREPA SUF Reply ¶ 37). VSA dba VIN's first recorded misrepresentation was on February 28, 2006 (Docket Entry No. 50-10 ¶ 6), and PREPA has cited no false representation that could have preceded, let alone affected, its consent to the First Contract. PREPA learned of VSA's investigation and its conviction of December 10, 2007 (PREPA SUF Reply ¶ 81), no later than May 2009 (PREPA SUF Reply ¶¶ 90-91). PREPA then temporarily suspended VIC from its Registry of Bidders while it investigated whether VIC had violated Law 458 by not informing PREPA of VSA's guilty plea and conviction. (See Docket Entry No. 39-17 at 1; Docket Entry No. 40-9 at 3; PREPA SUF Reply ¶ 101.) Regarding VIC's suspension, Administrative Judge Jaime Ortíz Rodríguez issued an interlocutory determination on October 13, 2009, stating that "to harmonize the interests of both parties," VIC should be reinstated to PREPA's Registry of Bidders during PREPA's own administrative investigation, since doing so "would not cause any undue prejudice to [PREPA] since if at the end of its investigation it is confirmed that [VIC] should have

informed [PREPA of] the conviction of [VSA] in the sworn statement, Law 458 itself provides that any contract in effect and obtained in violation of said Law can be canceled and obviously the permanent suspension [of VIC] from the registry of bidders." (Docket Entry No. 39-17 at 2-3; PREPA SUF Reply ¶¶ 102, 104-105. See also Vitol SUF Reply ¶ 86.) By implication, Judge Ortíz Rodríguez did not construe section 928f as requiring suspension on account of the mere existence of an investigation; had that been the case, PREPA's own investigation would have required maintenance of the suspension.

Ultimately, PREPA fails to show that VSA dba VIN's possible violation of the disclosure requirements of section 928f alone, for which Law 458 specifies no remedy,[31] was so "serious" that PREPA would not have executed Contracts beyond the First Contract, or that it would not have awarded the Second and Third Contracts to VSA dba VIN, but for the possible misrepresentations (on February 28, 2006, December 28, 2006, and on another unspecified date) that it had "no knowledge of being under judicial, legislative or administrative investigation in Puerto Rico, the United States of America or in any other country" (Docket Entry No. 50-10 ¶ 6; Docket Entry No. 43-16 at 8-9, 12). See 31 L.P.R.A. § 3408. PREPA has not argued that, had it known of VSA's investigation and conviction sooner, it would have ceased performance under the First Contract, nor has it offered any support for the conclusion that it would not have executed subsequent contracts in light of such information.[32] (PREPA Mot. at 38-40.) Indeed, PREPA did not terminate the Fourth, Fifth, or Sixth Contracts, but continued to order and accept

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[31] While § 928f requires disclosing investigations, Law 458 provides no remedy for false representations about investigations, only for convictions and guilty pleas. See generally 3 L.P.R.A. § 928 et seq.

[32] Although the Second and Third Contracts were awarded to VSA dba VIN, they were not executed until after they were transferred to VIC, which executed those contracts on January 23, 2007. (PREPA SUF Reply ¶¶ 27, 37, 42-44, 46-48.)

fuel from Vitol during its internal investigation (Vitol SUF Reply ¶¶ 72-84), and it later invited VIC to bid on at least one other contract after its own investigation concluded with VIC's reinstatement to PREPA's Registry of Bidders. (Id. ¶¶ 89-90.)

To the extent the elements of illicit consideration differ from those of serious deceit, and given the absence of any violation of Law 458 and the consequent lack of serious deceit concerning VSA's investigation—as VIC made accurate representations and VIN made representations that PREPA's behavior reveals did not vitiate consent—it is impossible as a matter of law for this Court to find that the consideration underlying any of the six Contracts was undermined by any illegality or by a fraudulent intent to cause damage or harm to another party. See Dennis, 21 P.R. Offic. Trans. at 207 (noting illegal consideration occurs where contract is illegal per se or when party intends to cause damage, harm, or to commit fraud thereby). Regarding fraudulent intent, not only is it undisputed that VIC fully performed its delivery obligations and with a thin profit margin (Vitol SUF Reply ¶¶ 47, 48, 80, 82, 85, 114), there is no evidence that VIC intended to harm PREPA or that VIC actually harmed PREPA (PREPA Mot. at 58-59 & n.26). Accordingly, the Court grants summary judgment to Vitol (and denies summary judgment to PREPA) on Cause of Action 2 of the 2009 Complaint and Causes of Action 3, 6, and 8 of the 2012 Complaint.

C. Remaining Causes of Action

1. Vitol's Counterclaim

The Court now turns to VIC's Counterclaim Causes of Action, to the extent those Causes of Action are the subject of either of the Cross-Motions. (Vitol Mot. at 45; PREPA Mot. at 1.) In the absence of any legal basis for invalidating any of the contracts at issue, and given that PREPA does not dispute that VIC has fully performed its delivery obligations under the

contracts, the Court is left to conclude and declare that the Fifth and Sixth Contracts are valid and enforceable. (Vitol Answers and Counterclaim at 34-35.) Accordingly, the Court grants VIC summary judgment as to Cause of Action 1 of its Counterclaim (seeking declaratory relief) and denies summary judgment to PREPA with respect to the same. As a result, the Court also grants VIC summary judgment as to Cause of Action 2 of its Counterclaim (seeking judgment against PREPA in the amount of $28,489,560.16 in unpaid principal, plus interest), but denies VIC summary judgment as to Cause of Action 5 of its Counterclaim (seeking "imposition of [post-judgment] interests over the total amount of the judgment against [PREPA]" under Rule 44.3(a) of the Puerto Rico Rules of Civil Procedure), since postjudgment interest is governed exclusively by federal law (see In re Redondo Constr. Corp., 820 F.3d 460, 467-68 (1st Cir. 2016); 28 U.S.C. § 1961) and will be allowed in accordance with 28 U.S.C. § 1961. (Vitol Answers and Counterclaim at 35-36, 37.)

The Court grants summary judgment to PREPA as to VIC's Counterclaim Cause of Action 3 (seeking an undetermined amount of economic and reputational damages) because VIC has abandoned its burden of proof as to Causes of Action 3. (Vitol Answers and Counterclaim at 36-37; PREPA Mot. at 70 n.28.) Dismissal of Cause of Action 3 of VIC's Counterclaim is further warranted because Vitol does not dispute that it failed to seek economic or reputational damages by the deadline for filing proofs of claim, and the order setting the deadline provides that failure to do so in a timely manner bars such claims. (See PREPA Mot. at 70 n.28; *Order (A) Establishing Deadlines and Procedures for Filing Proofs of Claim and (B) Approving Form and Manner of Notice Thereof*, Docket Entry No. 2521 in Case No. 17-3283 ¶ 15 (the "Bar Date Order"); *Order (A) Extending Deadlines for Filing Proofs of Claim and (B) Approving Form and Manner of Notice Thereof*, Docket Entry No. 3160 in Case No. 17-3283

¶ 2.)[33] VIC has altogether failed to respond to PREPA's Motion for judgment as to VIC's Cause of Action 3 and does not argue that it is entitled to an exception from the provisions of the Bar Date Order. Accordingly, the Court grants summary judgment to PREPA, dismissing Cause of Action 3 of VIC's Counterclaim.

PREPA's motion for summary judgment is granted as to Causes of Action 6 (asserting inverse condemnation) and 7 (asserting an illegal taking without just compensation in violation of the Fifth Amendment) of VIC's Counterclaim (Vitol Answers and Counterclaim at 38-39; PREPA Mot. at 1) because, in light of the Court's conclusions regarding the inapplicability of Law 458 and the parties' respective rights under the fuel contracts, PREPA's non-payment constitutes a mere breach of contract rather than a deprivation of property without constitutional due process. See Jiminez v. Almodovar, 650 F.2d 363, 370 (1st Cir. 1981). Accordingly, Causes of Action 6 and 7 of VIC's Counterclaim do not state claims upon which relief may be granted and are therefore dismissed. Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 12(h)(3); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

2. PREPA's Remaining Causes of Action

To the extent PREPA's remaining Causes of Action depend on establishing that the Six Contracts are either void under Law 458 or by reason of dolo or deceit (entitling PREPA to recover all amounts paid under them), which issues have been resolved in favor of Vitol rather than PREPA, this Court must also grant summary judgment to Vitol. These include, in the 2009

[33] Under the terms of the Bar Date Order, "any creditor who fails to file a proof of claim on or before the applicable Bar Date . . . shall be forever barred, estopped, and enjoined from asserting such claim against the Debtors or thereafter filing a proof of claim thereto in these Title III Cases (unless otherwise ordered by the Court), and the Debtors and their property shall be forever discharged from any and all indebtedness or liability with respect to such claim." (Bar Date Order ¶ 15.)

Complaint, Causes of Action 3 (seeking damages under Article 1060 of the Civil Code for deceit), 4 (mislabeled as 3, seeking damages under Article 1054 of the Civil Code for breach of contract), 5 (mislabeled as 4, seeking liability of any surety companies), 6 (mislabeled as 5, seeking liability of any insurers), 7 (mislabeled as 6, seeking fees and litigation costs), and 8 (mislabeled as 7, seeking payment of interests under Rules 44.3(a) and 44.3(b) of the Rules of Civil Procedure of Puerto Rico). (2009 Compl. ¶¶ 59-80; Vitol Mot. at 1.) PREPA's Motion is denied to the extent it only seeks summary judgment on Causes of Action 1 and 2 in the 2009 Complaint (2009 Compl. ¶¶ 32-58; PREPA Mot. at 1).

Concerning the 2012 Complaint, the Court grants summary judgment to Vitol dismissing Causes of Action 4 (seeking a declaratory judgment that PREPA does not have to return the consideration provided by Vitol or fulfill its contractual obligations), 5 (seeking damages in the amount of $5,000,000), and 9 (seeking costs and attorney fees and interests). (2012 Compl. ¶¶ 76-82, 103-106; Vitol Mot. at 1.)

The Court grants the Vitol Motion for summary judgment as to PREPA's Cause of Action 7 (seeking nullification of transfer of the First Contract from VSA dba VIN to VIC) of the 2012 Complaint. PREPA did not seek summary judgment on Cause of Action 7 and it failed entirely to respond to Vitol's request for summary judgment as to that Cause of Action. (See Vitol Mot. at 12 n.3.) The 2012 Complaint alleges that the transfer of the First Contract required prior written consent (2012 Compl. ¶ 93), and the factual record shows that VIN's assets were assigned to VIC on January 1, 2007 (PREPA SUF Reply ¶¶ 20, 25, 41, 43, 47), but that PREPA's written confirmation acknowledging VIC was authorized to receive payments and to assign its payments to the Sumitomo Mitsui Banking Corporation apparently occurred months later (on October 16, 2007) (id. ¶ 26; Vitol SUF Reply ¶ 59). This written acknowledgment by

PREPA, though not the prior authorization required under the First Contract, nevertheless effectively manifests consent since PREPA apparently did confirm its arrangement with VIC in writing, and PREPA does not dispute that it also made payments on 44 invoices issued by VIC, to VIC. (Id. ¶ 57; Vitol Mot. at 12 n.3. See 31 L.P.R.A. § 3401.) To the extent Cause of Action 7 in the 2012 Complaint depends on the assertion that "PREPA did not consent in writing" to the transfer of the First Contract (2012 Compl. ¶ 94), Vitol has satisfactorily shown that PREPA ultimately evinced its consent in writing. Vitol has therefore demonstrated its entitlement to summary judgment dismissing Cause of Action 7 in the 2012 Complaint. PREPA's Motion is denied to the extent it only seeks summary judgment as to Causes of Action 1, 2, 3, 4, 5, 6, and 8 in the 2012 Complaint (PREPA Mot. at 1).

3. PREPA's Motion for Summary Judgment Concerning Affirmative Defenses

Finally, the Court grants PREPA's Motion insofar as it seeks summary judgment striking Vitol's affirmative defenses alleging that PREPA's claims were time-barred, that PREPA failed to exercise due diligence or mitigate damages, and that PREPA would be unjustly enriched by the relief it seeks. (Compare Vitol Answers and Counterclaim at 23, 25-26, 60, 62 with PREPA Mot. at 47-51, 66.) Vitol did not oppose PREPA's motion concerning those affirmative defenses. Moreover, to the extent the parties have moved for summary judgment as to Vitol's affirmative defenses alleging violations of the Takings, Excessive Fines, and Due Process Clauses, those affirmative defenses are mooted by today's decision, as they are predicated on PREPA obtaining relief which this Court has denied. (See Vitol Answers and Counterclaim at 23-25, 61; Vitol Mot. at 37-45; PREPA Mot. at 51-66.) Accordingly, PREPA's motion for summary judgment striking these affirmative defenses is granted.

III.

CONCLUSION

For the foregoing reasons, the Vitol Motion is granted in part and denied in part. It is granted to the extent it seeks summary judgment dismissing the failed Causes of Action 1, 2, 3, 4, 5, 6, 7, and 8 of the 2009 Complaint, Causes of Action 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the 2012 Complaint, and to the extent it seeks summary judgment in Vitol's favor with respect to Causes of Action 1 and 2 of VIC's Counterclaim, and Vitol is entitled to the principal amount owed ($28,489,560.16), plus interest.

The Vitol Motion is otherwise denied to the extent it seeks summary judgment as to Causes of Action 5 of VIC's Counterclaim.

The PREPA Motion is also granted in part and denied in part. It is granted to the extent it seeks summary judgment dismissing Causes of Action 3, 6, and 7 of VIC's Counterclaim and to the extent it seeks summary judgment striking Vitol's affirmative defenses alleging that PREPA's claims were time-barred, that PREPA failed to exercise due diligence or mitigate damages, that PREPA would be unjustly enriched by the relief it seeks, as well as (in light of the Court's determinations as to the merits of PREPA's own claims) those asserting violations of the Takings, Excessive Fines, and Due Process Clauses of the Constitution of the United States. PREPA's Motion is denied to the extent it seeks summary judgment as to Causes of Action 1 and 2 of the 2009 Complaint, Causes of Action 1, 2, 3, 4, 5, 6, and 8 of the 2012 Complaint, and Causes of Action 1 and 2 of VIC's Counterclaim. This Opinion and Order resolves Docket Entry Nos. 37 and 48 in Adversary Proceeding No. 19-453.

The parties are directed to meet and confer to (A) identify any issues remaining to be resolved in this adversary proceeding and (B) file (within 21 days of the date of this Opinion

and Order) a (1) stipulation resolving any such issues, including but not limited to (a) the relevant period and rate for calculating any pre-judgment interest, (b) the total amount of any pre-judgment interest payable, (c) Vitol's claim for attorney's fees, and (d) whether the judgment may properly be entered upon the resolution of the outstanding issues, or (2) a status report including a proposed briefing schedule for any outstanding legal issues.

SO ORDERED.

Dated: September 27, 2021

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge